**UNPUBLISHED**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF IOWA**
**CENTRAL DIVISION**

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| UNITED STATES OF AMERICA,<br>Plaintiff,<br>vs.<br>ROBERT LEE PATE *aka* Flossy Floss,<br>Defendant. | No. **CR01-3039 MWB**<br><br>**REPORT AND RECOMMENDATION ON MOTION TO DISMISS** |

## *I. INTRODUCTION*

This matter is before the court on the motion of the defendant Robert Lee Pate ("Pate") to dismiss the Indictment, filed February 11, 2002, along with a supporting brief. (Doc. Nos. 21 & 22) The defendant (the "Government") filed its response on February 22, 2002 (Doc. No. 28). The court held a hearing on the motion on March 28, 2002, at which Pate appeared in person with his attorney David Eastman, and Assistant U.S. Attorney Shawn Wehde appeared on behalf of the Government. The Government offered the testimony of Robert Otto, Acting Chief Deputy U.S. Marshal for the Southern District of Iowa. Pate testified in his own behalf, and also offered the testimony of Brice Ausenhuis, Records Officer for the Cerro Gordo County Sheriff's Department.

The following exhibits were admitted into evidence without objection: Defense Ex. A, Detainer Against Unsentenced Person dated 09-18-01, re: Robert Lee Pate, Jr.; Defense Ex. B, Detainer Against Unsentenced Person dated 11-27-01, re: Robert Lee Pate; Defense Ex. C: Docket sheet from Northern District of Iowa in Case Number

CR01-3039-MWB; Government Ex. 1: Detainer Against Unsentenced Person dated 09-18-01, with handwritten notations; Government Ex. 2: Docket sheet from Southern District of Iowa in Case Number 01-M-20220; Government Ex. 3: Court minutes from Southern District of Iowa, showing Pate's initial appearance on 12/11/01, before U.S. Magistrate Celeste Bremer; Government Ex. 4: Waiver of Rule 40 Hearings, Case No. 4-01-M-20220, Southern District of Iowa, signed by Robert Pate and Nick Drees.

Subsequent to the hearing, Pate provided the court with a facsimile copy of a Fifth Judicial District Department of Correctional Services, Terms and Conditions of Probation Contract, signed by Pate and an Intake Probation Officer on November 20, 2001. The court admits the document into evidence in this matter as Court Ex. 1.

The court now deems this matter fully submitted, and turns to consideration of Pate's motion to dismiss.

## *II. FACTUAL BACKGROUND*

The relevant facts are not in dispute. Pate was indicted in this court on August 21, 2001, and a warrant was issued for his arrest. (Doc. Nos. 1 & 2) On or about September 17, 2001, Pate received a letter from the Polk County probation office, stating there were three warrants outstanding for Pate's arrest. One was the federal warrant on the charges involved in the instant case. A second was from Cerro Gordo County for possession of marijuana. The third was from Polk County for a probation violation.

The next day, September 18, 2001, Pate went to the Polk County Sheriff's Office and turned himself in, stating he had discovered the existence of the three warrants for his arrest. A sheriff's deputy placed Pate under arrest.[1] The same day, a federal

[1]Pate claims the deputy told Pate he was under arrest on all three warrants. He said the deputy named the federal warrant first and gave him a copy of the warrant.

Detainer Against Unsentenced Person was issued by the U.S. Marshal for the Northern District of Iowa, directed to the Polk County Jail. (Defense Ex. A) The receipt box on the detainer shows it was received in Polk County on September 18, 2001. The detainer advises the recipient to notify the U.S. Marshal prior to releasing Pate from custody, so the Marshal could assume custody "if necessary." (*Id.*) The detainer also requests that the Marshal be notified if Pate is transferred to another facility, and asks for the detainer to be forwarded to the new facility. The detainer also provides:

> The notice and speedy trial requirements of the Interstate Agreement on Detainers Act do NOT apply to this Detainer because the subject is not currently serving a sentence of imprisonment at the time the Detainer is lodged. IF THE SUBJECT IS SENTENCED WHILE THIS DETAINER IS IN EFFECT, PLEASE NOTIFY THIS OFFICE AT ONCE.

(*Id.*)

Pate went to court on September 19, 2001, in Polk County. A cash bond was set at $7,000 on the probation violation, and $2,500 on the possession charge. No bond was set on the federal charges. Because Pate believed he could not be released due to the federal detainer, he did not post bond on the state charges.

Pate was sentenced on the probation violation on November 19, 2001, receiving a 30-day sentence with credit for time served. Pate then was transferred to Cerro Gordo County to answer the possession charge. He arrived in Cerro Gordo County on November 21, 2001. The Polk County Sheriff's Office notified the U.S. Marshal of Pate's transfer, and on November 21, 2001, a second Detainer Against Unsentenced Prisoner was issued, this time to the Cerro Gordo County Sheriff's Office. (Defense Ex. B) The receipt box on the detainer indicates it was actually received in Cerro Gordo County on November 27, 2001. (*Id.*)

On November 29, 2001, Pate was sentenced in Cerro Gordo County to three days in jail on the possession charge, with credit for time served. While Pate was in Cerro Gordo County, the Sheriff of that county received records from Polk County that included an Order signed by Polk County Judge Scott Rosenberg. On the bottom of the order was a notation that Pate should not be released from jail until he had signed a probation contract. The same information was contained in the Polk County booking records. From the record before this court, there appears to have been a misunderstanding surrounding Judge Rosenberg's Order. Pate testified that at his hearing in Polk County, a probation officer told the court he wanted Pate held until he had signed a probation contract. This likely resulted in the notation on the bottom of the Order. As Court Ex. 1 shows, Pate had signed a probation contract on November 20, 2001, prior to his transfer from Polk County. However, Judge Rosenberg's order was transmitted to Cerro Gordo County without an indication that Pate had already complied with its requirements. Due to the error, Cerro Gordo County did not release Pate to the federal detainer after he was sentenced on the possession charge, but instead, made arrangements to transfer Pate back to Polk County.

Pate arrived back in Polk County on December 1, 2001. On December 10, 2001, when no further proceedings had occurred, Pate contacted Rodney Ryan, who had been Pate's lawyer in Polk County, to ask why he was still in the Polk County Jail. Ryan said he would call the Marshal's Office that date to inquire. The next day, December 11, 2001, Pate was released into federal custody. The Marshal picked Pate up from the Polk County Jail and immediately took him before U.S. Magistrate Celeste Bremer in Des

Moines, Iowa, for an initial appearance.[2] (*See* Gov't Ex. 2, Doc. No. 1) Pate waived a Rule 40 hearing and was removed to the Northern District of Iowa. He had an initial appearance in this district on December 13, 2001,[3] and was arraigned on the current charges on December 17, 2001. (Defense Ex. C, Doc. Nos. 4 & 17)

## *III. ANALYSIS*

Pate argues the delay from the time he turned himself in on September 18, 2001, to the date of his initial appearance in this court, or alternatively from the date he was erroneously returned to the Polk County Jail with no State action to hold him there until the date of his initial appearance in this court, "constitutes an unnecessary delay in violation of F.R.Cr.P. 9(c)."[4] (Doc. No. 21, ¶ 10) Pate first argues that when the Polk County Sheriff arrested him, the deputy informed Pate he was being arrested on all three of the outstanding warrants, including the federal warrant. Pate therefore claims the federal warrant had been "executed" for purposes of Rule 9(c), and he should have been brought before a federal magistrate forthwith for an initial appearance on the federal charges.

In the alternative, Pate argues that when he was returned to Polk County after being sentenced on the Cerro Gordo County charges, there was no legitimate State hold on him, and absent the federal detainer, he would have been released. He claims the

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[2]In Pate's motion and brief, he omits this initial appearance in Des Moines from his chronology of events, stating his only initial appearance was held on December 13, 2001. At the hearing, Pate's counsel acknowledged this was an inadvertent error, as he had been unaware of the December 11th initial appearance.

[3]*Id.*

[4]Rule 9(c) provides, in pertinent part, that an officer executing a warrant "shall bring the arrested person without unnecessary delay before the nearest available federal magistrate judge or, in the event that a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041."

Marshal effectively created an agency relationship with the Polk County Sheriff by relying upon the Sheriff to notify the Marshal's Office when the Polk County charges had been satisfied and Pate was available for release. Pate asserts the delay from December 1, 2001, when he arrived back in Polk County, to December 10, 2001, when the Marshal finally learned Pate was available for release into federal custody, constitutes an unreasonable period of delay for purposes of Rule 9.

Upon either of these theories, Pate claims the indictment should be dismissed due to a violation of Rule 9(c)'s requirement that he be brought before a magistrate "without unnecessary delay." He also argues the delay effected a violation of his rights under the Speedy Trial Act, 18 U.S.C. § 3161.

The Government counters that Pate was not in federal custody until he was released by the Polk County Jail on December 10, 2001.

Although Pate's agency argument is a creative one, the court has found no authority to support Pate's argument that the filing of a detainer with the Polk County authorities created an agency relationship between Polk County and the Marshal's office, nor has Pate cited any such authority. Thus, the question before the court is when Pate was in federal custody for purposes of triggering the requirements of Rule 9 and the Speedy Trial Act.

Preliminarily, the court rejects Pate's allegation that he was arrested for purposes of the federal warrant when the Polk County Sheriff placed him under arrest on September 18, 2001. Although the deputy might have told Pate he was being placed under arrest because he had three outstanding warrants, naming the warrants and giving Pate copies, the court finds Pate was arrested on outstanding State warrants.

The real question, therefore, is whether Polk County's failure to release Pate on December 1, 2001, effectively placed Pate in federal custody. He argues it did, claiming the only reason he was being held was by virtue of the federal detainer.

> A detainer is a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking the institution either to hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent.

*Carchman v. New Jersey Dept. of Corr.*, 473 U.S. 716, 719, 105 S. Ct. 3401, 3403, 87 L. Ed. 2d 516 (1985) (citations omitted); *see also United States v. Shahryar,* 719 F.2d 1522, 1524-25 (11th Cir. 1983). *Cf. Galaviz-Medina v. Wooten,* 27 F.3d 487, 493 (10th Cir. 1994) (The majority of courts have determined the lodging of an INS detainer does not render an alien "in custody" for purposes of the alien's right to pursue *habeas* relief.)

In this case, the detainer did not ask Polk County to hold Pate for the federal government; rather, the detainer was of the second type described by the Supreme Court, and asked Polk County to notify the Marshal when Pate's release was imminent.

> Numerous courts have held that only federal arrest, as distinct from state arrest, triggers the protections of the Speedy Trial Act. *See United States v. Shahryar,* 719 F.2d 1522 (11th Cir. 1983); *United States v. Janik,* 723 F.2d 537, 542 (7th Cir. 1983); *United States v. Iaquinta*, 674 F.2d 435 (2d Cir.), *cert. denied*, 434 U.S. 847, 98 S. Ct. 154, 54 L. Ed. 2d 115 (1977). It is undisputed that defendant was initially taken into custody pursuant to a state arrest.
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> To define a federal arrest for purposes of the Speedy Trial Act, courts have held uniformly that "one was not arrested within the intendment of the Speedy Trial Act until he be taken into custody after a federal arrest for the purposes of responding to a federal charge." *United States v. Iaquinta*, 674 F.2d at 266 (citing *United States v. Leonard*, 639 F.2d 101, 103-104 (2d Cir. 1981)).

*United States v. Copley*, 774 F.2d 728, 730 (6th Cir. 1985). *See Shahryar*, 719 F.2d at 1524-1525 (starting date for speedy trial purposes "is the date that the defendant is delivered into federal custody. . . . [T]he federal government is not bound by the actions of state authorities[.]")

Similar to the facts in *Copley*, in the present case Pate was held by Polk County authorities not because of the federal detainer, but because those officials mistakenly believed Pate had not yet complied with the conditions of release imposed by Judge Rosenberg. "Here, the State simply erroneously continued its custody pending notification of the disposition of the state charges." *Copley*, 774 F.2d at 730. The federal detainer was not, itself, "the source of the significant limitation of liberty effected by [Pate's] state custody . . . [and therefore,] the detainer was not the functional equivalent of a federal arrest for Speedy Trial purposes." *Copley*, 774 F.2d at 730-31.

Pate was brought before a magistrate one day after federal officials were notified Pate was available for release into federal custody. No violation of Pate's rights occurred, whether under Rule 9, the Speedy Trial Act, or the federal constitution. Accordingly, Pate's motion to dismiss should be **denied.**[5]

## *IV. CONCLUSION*

For the reasons discussed above, **IT IS RECOMMENDED**, unless any party files objections[6] to the Report and Recommendation in accordance with 28 U.S.C.

[5]Pate will, however, be entitled to credit against his federal sentence for the time he spent in State custody after all State proceedings actually had been concluded. *See Brown v. United States*, 489 F.2d 1036 (8th Cir. 1974); *United States v. Shillingford*, 586 F.2d 372 (5th Cir. 1978); *Boniface v. Carlson*, 856 F.2d 1434, 1436 (9th Cir. 1988); *Bloomgren v. Belaski*, 948 F.2d 688, 690 (10th Cir. 1991).

[6]Objections must specify the parts of the report and recommendation to which objections are made. Objections also must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of

§ 636(b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this report and recommendation, that Pate's motion to dismiss the indictment be denied.

**IT IS SO ORDERED.**

**DATED** this 4th day of April, 2002.

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PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

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the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).